STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiffs-Appellant,

v

RYAN SCOTT FEELEY,

Defendants-Appellee.
_____/

Supreme Court No. 152534

Court of Appeals No. 325802

Livingston Circuit Court No. 14-022259-AR

53rd District Court No. 14-1183-FY

ATTORNEY GENERAL BILL SCHUETTE'S AMICUS BRIEF IN SUPPORT OF LIVINGSTON COUNTY'S APPLICATION FOR LEAVE

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STATEMENT OF QUESTION PRESENTED

1. Whether a volunteer, reserve police officer is a "police officer" for the purpose of the resist-and-obstruct statute under Michigan law.

Appellant's answer:	Yes.
Appellee's answer:	No.
Trial court's answer:	No.
Court of Appeals' answer:	No.
The Attorney General's answer:	Yes.

INTRODUCTION

This Court should grant the Livingston County's application for leave to appeal. Not only does the decision of the Court of Appeals fail to honor the plain text of Michigan's resisting-and-obstructing statute, but it has created a two-tier system in Michigan for the protection of law enforcement officers, one for full-time officers and another for volunteer reserve officers. The decision is wrong as a matter of law and as a matter of policy. This Court's review is warranted.

The statute protects "police officers," which includes volunteer police officers, as persuasively argued by both Livingston County and Judge Sawyer's dissent. The importance of the majority's decision extends beyond the fact that it is wrong. This is not the first time that a strange hierarchy has existed in the protection of law enforcement in Michigan. Before 2002, Michigan law made it a *felony* to hinder a firefighter or harm a police dog, but only a two-year *misdemeanor* to resist a police officer. The Legislature remedied this anomaly in 2002.

The Michigan Court of Appeals now has introduced its own anomaly. If an uncooperative arrestee punches two police officers, one a full-time and the other a volunteer, he commits a two-year felony against one and a 93-day misdemeanor against the other. This aberration is based on a textual misreading.

As a matter of policy, reserve officers are entitled to the same protections as other police officers. They are protected by Michigan's governmental immunity statute, accorded qualified immunity by the federal courts, and equally risk themselves to protect the community. This is an important matter. This Court should grant leave and reverse.

ARGUMENT

I. Michigan law protects volunteer, reserve police officers from an individual who resists and obstructs these officers when they perform their duties.

The plain language of the resist-and-obstruct statute is clear that it covers police officers, and the ordinary meaning of police officer includes a reserve officer. The points advanced by the Livingston County Prosecutor's Office and Judge Sawyer's dissent correctly demonstrate that the error here is clear.

It also significant. The idea that the law would segregate reserve officers as victims from other officers does not track at all the purposes of the law. The statute was designed to eliminate a two-tier system. It is also consonant with the law on reserve police officers under the MCOLES regulatory framework as well as for purposes of state action, governmental immunity, and qualified immunity.

A. The statute's plain language includes reserve police officers, and the statutory law for MCOLES only confirms this point.

The phrase at issue here relates to whether a reserve police officer is a "police officer" for purpose of the law prohibiting resisting and obstructing, and the statute lists various categories that qualify as a "person" for whom this protection applies. The first category is a "police officer":

> A police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police. [MCL 750.81d(7)(i).]

The other categories are university or college police officers, federal conservation officers, sheriffs and deputy sheriffs, constables, United States peace officers, firefighters, emergency personnel, and anyone engaged in search and rescue. MCL 750.81d(ii) through (x). There is no definition of "police officer" in the statute.

The Court of Appeals concluded that "police officer" did not have a "broad meaning" because the statute would not have otherwise listed law enforcement officials like sheriffs who would already appear to be included in the definition of "police officer." See *People v Feeley,* slip op, pp 2-3. In this way, the Court relied in part on the canon of *expressio unius est exclusio alterius* to find that reserve officers were not included. *Id.* But that canon (also known as the negative-implication canon) does not apply under the plain language of this statute. In fact, the relevant language—"[a] police officer . . . of a political subdivision of this state *including, but not limited to,* a motor carrier officer or capitol security officer of the department of state police," MCL 750.81d(7)(b)(*i*) (emphasis added)—specifically disclaims that canon. As one leading treatise on statutory interpretation explains, the phrase "including but not limited to" is "intended to defeat the negative-implication canon." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* § 15 (Thompson/West 2012). Here, the plain text shows that the Legislature intended to include all types of police officers, and that includes reserve police officers.

Further, the fact that the Legislature went on to list some officials who are police officers (e.g., sheriffs) but others who are not (e.g., firefighters) does not mean that "police officer" should be given anything other than its plain construction. And on this point, the Livingston County Prosecutor's application and the dissent of Judge Sawyer both effectively explain that a reserve police officer *is* a police officer. See Livingston Co.'s Brief, pp 9-14; *Feeley,* slip op, pp 2-4 (Sawyer, J., dissenting).

The Attorney General would like to make two other points on the merits:

First, the idea that a reserve police officer is not a police officer operates as an oxymoron. Ordinarily, an adjective defines a subset of the group, like the phrase "tall police officers" identifies a segment of the category of police officers. That is how the phrase "reserve police officers" operates, identifying those police officers who are not full time and paid. According to the Court of Appeals, however, the adjective "reserve" entirely excludes the noun it describes; "reserve" means that they are not police officers at all, at least for the purpose of the statute. This truly is a contradiction in terms, a little like saying an "unlawful law." In the Court of Appeals' view, the adjective nullifies the category as a whole, and rather than identify a segment within the group, identifies a separate category outside the group. That is the holding of the Court of Appeals here: a reserve police officer is not a police officer. Nothing in the statute's language requires this inherent contradiction.

Because the statute does not provide the definition, Judge Sawyer was perfectly justified in turning to dictionary definitions. See slip op, pp 2-3 (a police officer is "a member of the police force" and police force is "a body of trained officers entrusted by a government with maintenance of public peace and order, enforcement of laws, and prevention and detection of crime."). A reserve officer falls comfortably within that definition. And if the Court were going to draw a line anywhere about the touchstone of a police officer, the oath is one of the hallmarks of official authority. Cf. *id.* at 3. The reserve police officer here would meet this definition.

The fatal flaw of the majority decision is that it does not affirmatively define the irreducible characteristics of a police officer. It does identify that the training of the reserve police officer here was less than that is required of a "regularly employed" police officer, see slip op, p 3 n 3, citing MCL 28.602(l)(i),[1] but nonetheless does not define the elements of the definition of a police officer or explain why being a volunteer or less than full time is disqualifying.

Second, Feeley attempts to remedy this deficiency by relying on the definitions of police officer found in the statutory scheme related to the Michigan Commission on Law Enforcement Standards (MCOLES) and its regulation of police officers and their authority to carry firearms. See Feeley's Brief, pp 4-6. But the MCOLES statutes cut just the other way. They support the conclusion that reserve police officers are police officers under the resist-and-obstruct statute.

The fact that the statute regarding the scope of authority for establishing standards for law enforcement officers in MCOLES expressly excludes "a police auxiliary temporarily performing his or her duty under the direction of the sheriff or police department" is telling. See MCL 28.609(1). A fair inference from the express exclusion of reserve police officers is that otherwise the ordinary meaning of "police officers" would indicate that the standards would apply equally to them.

[1] The majority opinion actually cites "MCL 28.602(c)" but in context is referring to MCL 28.602(l)(i), which defines a "police officer" as a "regularly employed member of a law enforcement agency authorized and established by law, including common law, who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state."

Moreover, the basic scheme from MCOLES' regulation of police officers further supports the point. Section 9a(1) states that MCOLES shall certify persons who meet standards and are employed in a position within the scope of that term:

> The commission shall grant certification to a person who meets the law enforcement officer minimum standards at the time he or she is employed as a law enforcement officer. [MCL 28.609a(1).]

Not surprisingly, the Supreme Court and Court of Appeals have observed that the definition in question serves the purpose of defining the individuals within the MCOLES Act's regulatory scope. *Peden v City of Detroit*, 470 Mich 195, 209 (2004); *Michigan State Employees Ass'n v Attorney General*, 197 Mich App 528, 531-532 (1992). Likewise, several opinions of the Attorney General have drawn the same conclusion. See, e.g., OAG, 1987-1988, No 6490, p 249 (January 22, 1988).

In comparison, the definition in MCL 750.81d(7)(b) serves a very different purpose. This Court has held it is used to identify the various "law enforcement officials and other emergency responders who are protected" by the resist-and-obstruct provision of the Penal Code. *People v Moreno*, 491 Mich 38, 54 (2012). The difference in purpose between the respective definitions is more obvious when comparing the types of officers included within them.

By its express terms, MCL 750.81d(7)(b) includes "a motor carrier officer or capitol security officer of the department of state police." MCL 750.81d(7)(b)(i). It also includes a "peace officer of a duly authorized police agency of the United States, including, but not limited to, an agent of the secret service or department of justice." MCL 750.81d(7)(b)(vii).

In contrast, the MCOLES Act does not require certification of motor carrier officers. *People v Carey*, 382 Mich 285, 293-294 (1969); OAG, 1987-1988, No 6530, p 362 (August 5, 1988). Nor do its requirements apply to capitol security officers. OAG, 1987-1988, No 6490, p 249 (January 22, 1988). Nor are they applicable to federal law enforcement officers. OAG, 1979-1980, No 5735, p 861 (July 9, 1980). The MCOLES Act only includes law enforcement officers whose authority is commensurate with the authority of "peace officers" under Michigan common law. *Michigan State Emp Ass'n v Attorney General,* 197 Mich App 528, 531-532 (1992). See also OAG, 1987-1988, No 6490, p 249 (January 22, 1988); OAG, 1977-1978, No 5133, p 83 (April 1, 1977); OAG, 1977-1978, No 5166, p 79 (March 25, 1977). Thus, Feeley's claim that excluding a reserve police officer from the purview of the MCOLES Act requires exclusion from the scope of MCL 750.81d(7) is not borne out.

B. The creation of this distinction between full-time officers and reserve officers is bad policy and defeats the law's purposes.

While the statutory language demonstrates that Judge Sawyer has the correct legal analysis, this matter is significant as a matter of policy for the state and its law enforcement community, and therefore is jurisprudentially important.

As an initial matter, these reserve officers perform a vital function for the local communities in Michigan. While reserve officers operate under the authority of full-time officers, they ordinarily have received training, wear the uniform of the police agency, and have taken an oath to serve and protect the people of the community. See, e.g., Wayne County, "Become a Reserve Deputy" (requiring a ten-

week program of training meeting three times a week, noting that they will be "sworn into the division," and imposing the cost of equipment and uniform on the applicant).[2] The City of Detroit has more than 400 reserve officers alone. See City of Detroit, "Volunteers in Police Service" (identifying more than "400 members" of the Detroit Police Reserve Program).[3] This program takes on added significance where the number of full-time police officers is down almost 4000 officers since 2001. Compare MCOLES 2001 Annual Report, p 55 (20,067 full-time police officers) with MCOLES 2015 Law Enforcement Distribution Statistics 2014-2015, p 19 (16,373 full-time police officers).[4]

In misreading the statute, the Court of Appeals has created a separation between (1) full-time, paid police officers and (2) volunteer, reserve officers at a time when police agencies are increasingly dependent on volunteer police officers. The anomaly is a straight-forward one. If police officers arrest a violent criminal and that criminal assaults the arresting officer, the crime will either be a two-year felony under MCL 750.81d if the officer is a full-time employee, or a 93-day misdemeanor under MCL 750.81 if a reserve officer. No reasonable policy supports this dichotomy.

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[2] See http://www.sheriffconnect.com/operations/police-operations/reserve-division/join-the-reserve.html (last accessed December 14, 2015).

[3] See http://www.detroitmi.gov/How-Do-I/Volunteer/Volunteers-in-Police-Service (last accessed December 14, 2015.

[4] See https://www.michigan.gov/documents/mcoles/2001_Annual_Report_253409_7.pdf and http://www.michigan.gov/documents/mcoles/Fall_2015_Semiannual_LED_Report_503175_7.pdf (both sites last accessed on December 14, 2015).

It also conflicts with the way the law considers reserve officers. They are state actors. See *People v McRae,* 469 Mich 704, 714 (2004) (reserve deputy sheriff). They are protected by Michigan's government tort liability act. See MCL 691.1407(2) (referring to both an "officer and employee of a governmental agency" and "volunteer acting on behalf of a governmental agency"). They are protected by qualified immunity. See *McCoy v City of Monticello,* 342 F3d 842, 845 (CA 8, 2003) (auxiliary police officer). The majority decision of the Court of Appeals rejected the point that reserve police officers were otherwise treated as police officers as a matter of statutory construction. Slip op, pp 3-4. But the point here is one of about policy.

The resist-and-obstruct law seeks to enhance the punishment imposed on an offender when he resists police officers in the execution of their duties. It serves as a deterrent. In the ordinary case, an offender will not know whether a police officer is a full-time officer or a reserve officer, so the conduct that the statute is designed to discourage would be equally applicable regardless of whether the police officer is a reserve officer or not. The distinction here does not further the purposes of the statute.

The divide that the Court of Appeals has inserted between different classes of police officers also recreates a similar separation that existed before the Legislature created the new resist-and-obstruct statute in 2002 under MCL 750.81d. Before 2002, police officers were protected by MCL 750.479 (2001), which made it a two-

year high-misdemeanor to resist an officer.[5] And before its revision in 2002, the separate statute protecting firefighters, MCL 750.241, made it a four-year felony to obstruct a firefighter. See MCL 750.241(1) (2001) ("[a]ny person who shall knowingly and willfully hinder, obstruct, endanger or interfere with any fireman in the performance of his duties is guilty of a felony.") Finally, causing harm to a "police dog" while committing another crime was a two-year felony, which was not changed in 2002. See MCL 750.50c(3), (7).[6]

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[5] At the time, the resist-and-obstruct statute for police officers provided as follows:

> Any person who shall knowingly and willfully obstruct, resist or oppose any sheriff, coroner, township treasurer, constable or other officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or attempted to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be *guilty of a misdemeanor, punishable by imprisonment in the state prison not more than two years*[.] [MCL 750.479 (2001) (emphasis added).]

[6] The two relevant provisions are as follows:

> (3) A person shall not intentionally cause physical harm to a police dog or police horse or a search and rescue dog.
>
> * * *
>
> (7) A person who violates subsection (3) or (4) while committing a crime is guilty of a felony punishable by imprisonment for not more than 2 years[.] [MCL 750.50c.]

Thus, in an ironic twist, in 2001, if a criminal punched a police officer and then kicked a police dog and harmed it, the crime related to the police *officer* was a two-year *misdemeanor* and the crime related to the police *dog* was a two-year *felony*. A similar anomaly was present for resisting-and-obstructing a police officer as against a firefighter: the former was a high-misdemeanor and the latter a felony. The creation of MCL 750.81d was designed to end these inadvertent anomalies to make it uniformly a felony whether one resisted a police officer or a firefighter. See Michigan House Fiscal Agency Bill Analysis, HB 5440, August 29, 2002 (noting that it was a misdemeanor to assault a police officer while obstructing a firefighter was a felony and explaining that "these provisions would be deleted by House Bill 5442 and replaced with a new section added by House Bill 5440.") See also *Moreno,* 491 Mich at 53-54. The 2002 resist-and-obstruct statute fixed this problem.

In its error, the Court of Appeals has now created a new problem. This aberration has not been lost on the Legislature. Already, there is pending legislation to revise MCL 750.81d(7)(b)(i). See SB No. 668, which was introduced on December 10, 2015 ("A police officer of this state or of a political subdivision of this state including, but not limited to, *a reserve police officer*, a motor carrier 1 officer, or capitol security 2 officer of the department of state police").[7] The Legislature should not have to make this change because the law was already clear. This Court should beat the Legislature to the punch and correct this mistake.

[7] The proposed bill may be found at the following web address: http://www.legislature.mi.gov/documents/2015-2016/billintroduced/Senate/pdf/2015-SIB-0668.pdf.

CONCLUSION AND RELIEF REQUESTED

This Court should grant the Livingston County Prosecutor's application for leave, or, alternatively, peremptorily reverse and adopt Judge Sawyer's opinion as the opinion for the Court.

Respectfully submitted,

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